

Hussaini (Migration) [2021] AATA 3269 (18 August 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Fatema Hussaini
VISA APPLICANT:	Mr Arif Alizada
CASE NUMBER:	2000568
DIBP REFERENCE(S):	BCC2017/4267249
MEMBER:	Nicholas McGowan
DATE:	18 August 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations Statement made 12:07pm on 18 August 2021

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – validly married – child born of the relationship – support for the sponsor caring for newborn child – money transfers – awareness of living arrangements – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

1. The applicant applied for the partner visa based on her married relationship with her husband, who is an Afghan. The visa application was lodged on 14 November 2017. The marriage occurred on 12 July 2017 in Afghanistan. A certificate of marriage (at folio 6 of the departmental case file BCC2017/4267249) has been provided by the applicant to the Minister (for Immigration). The delegate in her decision dated 9 January 2020 accepted the marriage was valid in Australia. This Tribunal finds that all the evidence supports the claim the couple were lawfully married in Afghanistan under Islamic law and done so consistent with the requirements for recognition under Australia's Marriage Act. Accordingly, the requirements of s.5F(2)(a) are met.
2. On 9 January 2020 a delegate of the Minister for Immigration made a decision to refuse to grant the visa applicant the Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act). This is a review of that refusal. The applicant appealed the delegate's refusal decision to this Tribunal on 13 January 2020. On 21 July 2021 the case was constituted by the Tribunal's Registry for consideration by Member McGowan. On 18 August 2021 the Tribunal conducted a hearing into the review.
3. In the time since the review applicant lodged her application for review, the review applicant provided numerous documents to the Tribunal in support of the couple's visa application. They include, but are not limited to, a copy of birth certificate (including registration number) for the couples claimed child of their relationship born 11 November 2020 in Frankston Hospital, and which states the father is the applicant, Arif Alizda, of Malistan, Afghanistan, and the mother is the review applicant (applicant's wife) Fatema Hussaini, also of Malistan, Afghanistan. The Tribunal has received a letter dated 11 September 2020 from Monash Health Doctor Rebecca Roberts, in which Dr Roberts outlines reasons why she believes the presence of the visa applicant in Australia during the review applicant's pregnancy would be of benefit to both mother and unborn child. Dr Roberts wrote the letter at the request of the review applicant, and as "one of the doctors looking after her [the review applicant] during her pregnancy". Another letter dated 27 October 2020 is provided wherein the Manager of the Peninsula Health Women's Services, Della Attwood, states it would "...help her [the review applicant] tremendously if her husband is allowed to join her in a difficult pregnancy". Another letter from Peninsula Health dated 29 October 2020 from Social Worker Amber Leuders expresses her support for the review applicant's request to have her husband travel to Australia and provide support for her and their child. A further letter from Monash Children's Hospital Social Work staff, Ms Jennifer Ward, has been provided (undated) and speaks in support of the review applicant's husband's visa application being granted. The letter explains the couple's baby son was an inpatient 4 weeks after his birth for investigations around jaundice and other issues. Ms Ward expresses the view that the review applicant was experiencing social isolation and her separation from her husband was debilitating and very much needs his support. The review applicant also provided a letter dated 23 December 2020 from Monash Children's Hospital Paediatric registrar Dr Jeu How, which states as follows: *"XXXXX is a 5 week old baby boy with emerging complex medical issues which are likely to result in long-term high care needs. XXXXX's mother, Fatim is minimally supported as she has no immediate family members in Australia. While Fatim currently resides with extended family members, they are unable to fully support her with XXXXX's care. Fatim's social vulnerability and XXXXX's care requirements have resulted in significant carer stress for Fatim with considerable impact on her mental health. Fatim is at high risk of carer burnout. It is therefore imperative that his father's application for residency to Australia be expedited on compassionate grounds in order to care for his infant son and support Fatim with his medical care. Should you have further questions, please do not hesitate to contact me via the Monash Hospital switchboard."*

Spouse relationship

4. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse (or alternatively - though not relevant to this matter - de facto partner) of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who was at the time of application an Australian permanent resident
5. 'Spouse' is defined in s.5F of the Act. A person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
6. In forming an opinion about the above requirements, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
7. On the evidence (discussed above) the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
8. On the evidence above (and below) they live separately, as the visa applicant is in Afghanistan, and the review applicant in Melbourne, Australia, though this is a temporary arrangement brought about by the refusal to grant them the visa. Further, and importantly, the Tribunal is satisfied from all the evidence that the couple not only intend, but will 'live together' and do not live separately and apart on permanent basis. Accordingly, the parties satisfy s.5F(2)(d).

9. Circumstances of their relationship

10. The review applicant told the Tribunal at the hearing held 18 August 2021 the following circumstances as they applied/apply to the couple. The couple have no joint assets and no joint liabilities, though they do own the review applicant's uncle \$10,000.00 which he lent them to lodge the partner visa application. The couple do not pool their finances, though the review applicant has sent the visa applicant money which she says he needs. The last time the review applicant sent money to her husband was one-and-a-half- months ago, and she sent \$400.00. The review applicant obtained that money from Centrelink payments, and has no other source of income. The review applicant was asked whether she could provide evidence of the monetary transfer. The review applicant told the Tribunal she could provide receipts from her money transfers, which she advises she does via a money transfer business. The review applicant advised the amount changes, depending on his needs. The review applicant told the Tribunal the visa applicant used the money for English classes and accommodation (in Kabul). The Tribunal asked where the visa applicant lived when he was not in Kabul studying. The review applicant told the Tribunal the visa applicant lived with his mother and younger brother and sister, the four of them in one house. The Tribunal confirmed with the review applicant that no other people lived in that home, outside the family unit of four. The review applicant told the Tribunal they owe no legal obligations to each other outside marriage, and as they live separately (temporarily), they do not share day-to-day household expenses as such. The couple do have one child together. The review applicant was asked by the Tribunal that if it assisted their visa application would she agree to a DNA

parentage test to confirm the parentage of their child. The review applicant said she'd do "anything" and agreed she would have a parentage test if requested. The Tribunal did not make such a request but indicated it would record her response (in this decision) for the purposes of the department's understanding of the strength of her claim that the child born to her is indeed the couples. The review applicant explained to the Tribunal her husband does not provide money, but does support her emotionally, including their by-extension their child. The review applicant told the Tribunal that she presently lives with her uncle Ghulam Ali Hussaini born 1 January 1963. The review applicant told the Tribunal that initially when her husband comes to Australia, they would stay with her uncle until they could afford a place of their own. The review applicant's parents are both deceased. The review applicant said she cannot recall either their deaths, or them. The review applicant was asked who raised her, to which she answered, "my uncle and his wife" (who she now lives with). That uncle is her father's brother according her. The uncle was not at her wedding, but his wife (her aunty) was. The Tribunal also has a statement from the review applicant's brother stating he attended the couple's wedding. That statement is in the form of a Form 888 provided to the department previously (signed 4 December 2017). The review applicant says she and the visa applicant talk about what they will do should he arrives in Australia, and they speak about their own home, and life in Australia together. The relationship (a married one) started from 12 July 2017. The review applicant told the Tribunal they knew each other for along time. The Tribunal asked how long they had lived together for, to which the review applicant said, "The first time I went from here, for three months, then during the time we got married, after that we were together". The Tribunal asked how long they were together for after they married, and the review applicant said two-and-a-half months. The review applicant said she had also stayed for two-months another time but returned to Australia early because of Coivd-19. The review applicant had planned to stay for three months at that time, and then returned to Australia to continue her study (high school studies at Dandenong High School). The review applicant has kept school records which she is prepared to provide on request. The review applicant no longer studies now because she has a child. The Tribunal asked the review applicant what degree of companionship and emotional support they [the review applicant and visa applicant] draw from each other. The review applicant told the Tribunal they always talk and support each other emotionally and talk about their plans and how they will be together some day and have a happy life together. When asked whether she saw their relationship as long-term the review applicant told the Tribunal, "Yes, it is a long-term relationship, we love each other, and we like to grow old with each other".

11. On February 3, 2019 departmental officers conducted simultaneous telephone interviews with the review applicant and visa applicant. These interviews gave rise to a number of concerns as outlined by the delegate in her refusal decision dated 9 January 2020. The Tribunal discussed each concern with the review applicant during the hearing. Firstly, the visa applicant said he knew the review applicant because they went to the same school and saw each other on their way to school, while the review applicant said they were living in the same area. The review applicant told the Tribunal that both statements are correct. Secondly, the visa applicant said the families did not know each other, while the review applicant said they had known each other. The review applicant gave two answers and one question, all of each was difficult for the Tribunal to correlate with the question or make sense of. The Tribunal did not pursue it further as it seems apparent that regardless of how (historically) they knew one another, the fact remains, they did and do. Thirdly, the visa applicant said he'd spoke to the review applicant before she left Australia as he says her main purpose was to travel to Afghanistan to marry. The review applicant had said they were never in contact with each other after she migrated to Australia and that her main purposes to travel to Afghanistan in 2017 was to visit her brother and cousin. The review applicant told the Tribunal she had spoken with the visa applicant before she left for Afghanistan in 2017, and clarified her intentions were to visit her brother and cousin, and to marry her husband. This did not surprise the Tribunal as often applicants re reluctant to explain a marriage is arrange, as they fear it may be unlawful, which is it not. Fourthly, the visa applicant said the

wedding was held at the review applicant's paternal uncle's home, whereas the review applicant said it was held at the visa applicant's friend's house. The review applicant told the Tribunal their wedding was at her husband's (visa applicant's) uncle's home, and the later ceremony held a couple of days afterward was held at her husband's (the visa applicant's) friends place. Fifthly, the visa applicant told the officers that the review applicant lived with her uncle and his family (and her brother) while the review applicant said since the time she returned to Australia after getting married she was living by herself. The review applicant said when she came back from Afghanistan, she was living by herself. The review applicant said she hadn't told her husband she was living by herself as she didn't wish to worry him at that time, though she did later return to her uncle's home when she became pregnant. Sixthly, the visa applicant had received money but was of the view it came from his wife's (the review applicant's) brother or uncle. The review applicant told the Tribunal she didn't disclose the source of the funds to her husband, she didn't tell him how she got the money. Seventhly, the visa applicant was asked if the sponsor was working, and he said he did not know. The review applicant said she receives Centrelink assistance and she covers her own expenses. The review applicant confirmed the above is correct, she was not working, and she did/does receive Centrelink payments. The Tribunal nonetheless raised the question, shouldn't your husband (the visa applicant) know if you're working or not? The review applicant told the Tribunal she wasn't working, so he didn't know. The Tribunal asked again, shouldn't your husband know such things. The review applicant told the Tribunal she spoke with her husband and he knew she was not working, but perhaps he did not understand the question properly, but she maintained he knew she was not working. The review applicant added, that at that time she was studying. Eighthly, the visa applicant told officers they last spoke two weeks ago, while the review applicant said they spoke two days ago. The review applicant told the Tribunal there was a call a 'day before yesterday', which she did, and spoke to her husband's mother, but not her husband. The review applicant said that's how she understood the question, i.e. "when was the last time you called". Lastly, when the visa applicant was asked hypothetically (by the officer) what would happen if the partner visa was not granted, he answered their plans to have a good life together would not be fulfilled. The review applicant said if that's what he said, it is true, adding, "We are husband and wife, he is there and I am here, and if we can not live together of course our hopes of married life wouldn't fulfil."

12. The Tribunal also spoke with the review applicant uncle and took his oral evidence. Mr Ghulam Ali Hussaini told the Tribunal the review applicant has been highly stress with what has been going on (the visa application process), particularly lately given events in Afghanistan (Taliban capturing Malistan, Afghanistan) and no phone-line to find out whether her husband is safe). The uncle said his brother (with whom he spoke six days ago on the telephone) had moved to another area, and his brother told him the visa applicant had also moved away from Malistan (East toward a village sounding like "Sarjulg-e-Makanak"). [Note: the Tribunal can find no such town/village by this name based after a rudimentary web search, though this is not to say the parameters are accurate or the search sufficient]. The uncle's brother said the Taliban had killed some people where they had been in Malistan, though they escaped to a different area and are safe for now, though he added, things are deteriorating. Apart from this contact, the family have had no contact with the review applicant's husband (the visa applicant) since that time.

13. **Analysis**

14. After careful consideration, and dissemination of all the information, including working through the inconsistencies where they did become apparent based on the interviews conducted by the department previously, the overwhelming evidence in this case is consistent and the review applicant's oral evidence at hearing spontaneous and reliable.

15. The concerns raised by the delegate based on the simultaneous telephone interviews were reasonable and needed clarification. The Tribunal is satisfied the clarification provided at the hearing conducted today (18 August 2021) addresses them to the extent they need such.
16. The Tribunal accepts the child of the couple is theirs, though notes the review applicant had no hesitation in answering in the positive the Tribunal's query would she be prepared to provide DNA to confirm her son's parentage.
17. The uncle's oral evidence was consistent and spontaneous and therefore credible in the Tribunal's assessment.
18. The Tribunal is mindful of the fact this partner visa is the first step in a two-step visa process toward a permanent visa. The present visa (under review) is a temporary visa and would allow the visa applicant the chance to commence the couples married life living together permanently for the first time.
19. The Tribunal has been satisfied by the entirety of the couple's evidence that they have mutual commitment to a shared life to the exclusion of all others, and that their relationship is genuine and continuing. Accordingly, the couple satisfy s.5F(2)(b) and s.5F(2)(c).
20. Due to the present circumstances in Afghanistan the visa applicant has not been heard from for some six days (approximately). Given what is occurring in Afghanistan, and the fears held by the review applicant, and given the analysis above, the Tribunal has proceeded without delaying the matter further to speak to the visa applicant.

DECISION

21. On the basis of all the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of application and decision. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
22. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
23. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Nicholas McGowan
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).